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§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberations in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment, provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NO.91 CRS 40727

STATE OF NORTH CAROLINA)
)
VS)
)
HENRY LEE MCCOLLUM)
defendant)

ISSUES AND RECOMMENDATION

AS TO PUNISHMENT

ISSUES

ISSUE ONE-A:

Do you unanimously find from the evidence, beyond a reasonable doubt, that the defendant himself:

Killed the victim;

OR

Intended to kill the victim;

OR

Was a major participant in the underlying felony and exhibited reckless indifference to human life?

ANSWER yes

IF YOU ANSWER ISSUE ONE-A "NO," SKIP ISSUE ONE, TWO, THREE AND FOUR AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE-A "YES," PROCEED TO ISSUE ONE.

ISSUE ONE:

Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?

ANSWER yes

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE, "YES" IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES" IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES" IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO" IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO" IN THE SPACE AFTER ISSUE ONE.

(1) Was this murder committed for the purpose of avoiding or preventing a lawful arrest?

ANSWER yes

(2) Was this murder especially heinous, atrocious, or cruel?

ANSWER yes

IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE, AND FOUR AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE, "YES," PROCEED TO ISSUE TWO.

ISSUE TWO:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER yes

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE, "YES" IF ONE OR MORE OF YOU FINDS THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. WRITE "NO" IF NONE OF YOU FINDS THAT MITIGATING CIRCUMSTANCE.

IF YOU WRITE, "YES" IN ONE OR MORE OF THE FOLLOWING SPACES, WRITE "YES" IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE, "NO" IN ALL OF THE FOLLOWING SPACES, WRITE, "NO" IN THE SPACE AFTER ISSUE TWO.

(1) The DEFENDANT has no significant history of prior criminal activity.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(2) The capital felony was committed while the defendant was under the influence of a mental or emotional disturbance.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(3) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(4) The defendant acted under the duress or domination of another person.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(5) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(6) The age of the defendant at the time of the crime.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(7) The defendant is mentally retarded as indicated by one or more of the following facts:

a. The defendant was unable to perform adequately to keep up with his class in the fourth grade.

b. The defendant was determined to be in the mentally retarded range of intellectual functioning in the fourth grade.

c. The defendant was transferred to a special school for the emotionally disabled and mentally retarded in the fifth grade.

d. When the defendant was fifteen years old, his reading recognition level was evaluated at fourth grade, four months.

e. When the defendant was fifteen years old, his reading comprehension level was evaluated at second grade, nine months.

f. When the defendant was fifteen years old, his spelling level was evaluated at third grade, nine months.

g. When the defendant was fifteen years old, his I.Q. was determined to be 56.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(8) The defendant has difficulty understanding the English language as spoken on an adult level.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(9) The defendant is easily influenced by others.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(10) The defendant has difficulty figuring out how to solve problems.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(11) The defendant has difficulty thinking clearly when under stress.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(12) The defendant is unable to visualize or anticipate social consequences.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(13) The defendant is unable to make and carry out plans.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(14) The defendant grew up in an impoverished urban environment as evidenced by one or more of the following facts:

a. The defendant grew up in one of six high-rise apartment buildings in a housing project in Jersey City, New Jersey.

b. The building had constant maintenance problems; had graffiti on the walls; and, people did drugs in the hallways and urinated in the elevator.

c. The defendant was raised by his grandmother, and had limited contact with his natural father and mother.

d. The defendant's mother left New Jersey and moved to North Carolina with her other two children when he was nine years old, leaving him in New Jersey.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(15) The defendant was raped and sexually abused when he was twelve years old.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(16) Shortly after arrest, and at an early stage of the criminal process, the defendant voluntarily cooperated with the police by making a confession.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(17) Defendant has adapted to the disciplined environment of prison, and has committed no infractions during the period from 1983 to 1991.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(18) While in prison, the defendant has participated in religious activities.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(19) Any other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO, "YES." IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

ISSUE THREE:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found?

ANSWER yes

IF YOU ANSWER ISSUE THREE "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWERED ISSUE THREE "YES," PROCEED TO ISSUE FOUR."

ISSUE FOUR:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

ANSWER yes

IF YOU ANSWER ISSUE FOUR, "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT ON THE LAST PAGE OF THIS FORM."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "DEATH," OR "LIFE IMPRISONMENT," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, HENRY LEE MCCOLLUM be sentenced to DEATH .

This the 22 day of November, 1991.

FOREMAN OF THE JURY

JUDGE THOMPSON'S CHARGE TO THE JURY

Members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to recommend -- to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment.

Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will impose a sentence of death. If you recommend a sentence of life imprisonment, the Court will impose a sentence of life imprisonment.

All of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing proceeding any evidence which was submitted during the guilt phase of this case. All of the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment.

It is now your duty to decide from all the evidence presented in both phases what the facts are. And you must then apply the law which I'm about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or

might like it to be. This is important because justice requires that everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner and have the same law applied to him.

You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand. In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs.

As applied to this trial, these tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he testified; the manner and appearance of the witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness; whether his testimony is reasonable; and whether his testimony is consistent with other believable evidence in the case.

You're the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other

believable evidence in the case.

So I charge that for you to recommend that the defendant be sentenced to death, the State must prove four things beyond a reasonable doubt. A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things:

First, that the defendant himself killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited reckless indifference to human life.

Second, that one or more aggravating circumstances exist.

Third, that the mitigating circumstances are insufficient to outweigh any aggravating circumstances you have found.

And fourth, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances.

If you unanimously find all four of these

things beyond a reasonable doubt, it would be your duty to recommend that defendant be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to recommend that the defendant be sentenced to life imprisonment.

When you retire to deliberate your recommendation as to punishment, you will take with you a form entitled "Issues and Recommendation as to Punishment." This form contains a written list of five issues, four of which relate to aggravating and mitigating circumstances. I will now take up these five issues with you in greater detail one by one.

To ensure you to follow me more -- to enable you to follow me more easily, the bailiff will now give each of you a copy of this form entitled "Issues and Recommendation as to Punishment" which you will take with you when you retire to deliberate. Do not read ahead on this form, but refer to it as I instruct you on the law.

Issue 1(a) is do you unanimously find from the evidence beyond a reasonable doubt that the defendant himself killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited reckless indifference

to human life?

So if you find from the evidence beyond a reasonable doubt that the defendant killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited a reckless indifference to human life, you would answer issue 1(a) "yes."

If you do not unanimously find beyond a reasonable doubt that one of these facts existed, you would answer issue 1(a) "no."

If you answer issue 1(a) "no," you would skip issues one, two, three and four and recommend that the defendant be sentenced to life imprisonment.

If you answer issue 1(a) "yes," you would consider issue one.

Issue one is do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?

Two possible aggravating circumstances are listed on the form and you should consider each of them before you answer issue one. The State must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance. And before you may find any aggravating circumstance, you must agree unanimously that it has been so proven.

An aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law.

Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as aggravating circumstances.

Under the evidence in this case, two possible aggravating circumstances may be considered. The following are the aggravating circumstances which might be applicable to this case.

One, was the murder committed for the purpose of avoiding or preventing a lawful arrest?

A murder is committed for such purpose if the defendant's purpose at the time he kills is by that killing to avoid or prevent the arrest of himself or some other person and that arrest was or would have been lawful.

If you find from the evidence beyond a reasonable doubt that when the defendant participated in the death of the victim in the manner in which you have found in issue 1(a), it was, in fact, his purpose to avoid or prevent his arrest or the arrest of another person and that arrest was or would have been lawful,

you would find this aggravating circumstance and would so indicate by having your foreman write "yes" in the space after this aggravating circumstance on the issues and recommendation form.

If you do not so find or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreman write "no" in that space.

Issue two -- or aggravating circumstance two, was this murder especially heinous, atrocious or cruel?

In this context, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

However, it is not enough that this murder be heinous, atrocious or cruel, as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must

have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

If you find from the evidence beyond a reasonable doubt that this murder was especially heinous, atrocious or cruel, you would find this aggravating circumstance and would so indicate by having your foreman write "yes" in the space after this aggravating circumstance on the issues and recommendation form.

If you do not so find or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreman write "no" in that space.

If you unanimously find from the evidence beyond a reasonable doubt that one or more of these aggravating circumstances existed and have so indicated by writing "yes" in the space after one or more of them on the issues and recommendation form, you would answer issue one "yes."

If you do not unanimously find from the evidence beyond a reasonable doubt that at least one of these aggravating circumstances existed, and if you have so indicated by writing "no" in the space after every one of them on that form, you would answer issue one "no."

If you answer issue one "no," you would skip issues two, three and four and you must recommend that the defendant be sentenced to life imprisonment.

If you answer issue one "yes," then you would consider issue two.

Issue two is do you find from the evidence the existence of one or more of the following mitigating circumstances? Eighteen possible mitigating circumstances are listed on the form and you should consider each of them before answering issue two.

A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders.

Our law identifies several possible mitigating circumstances. However, in considering issue two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence which you deem to have

mitigating value.

The defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence. That is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exists. If the evidence satisfies any of you that a mitigating circumstance exists, you would indicate that finding on the issues and recommendation form. A juror may find that any mitigating circumstance exists by a preponderance of the evidence whether or not that circumstance was found to exist by all the jurors.

In any event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form, and any others which you deem to have mitigating value.

It is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

First, consider whether the defendant has no significant history of prior criminal activity.

Significant means important or notable.

Whether any history of prior criminal activity is significant is for you to determine from all the facts and circumstances which you find from the evidence. However, you should not determine whether it is significant only on the basis of the number of convictions, if any, in the defendant's record. Rather, you should consider the nature and quality of the defendant's history, if any, in determining whether it is significant.

All of the evidence tends to show that the defendant has no significant history of prior criminal activity. Therefore, as to this circumstance, I charge you that if one or more of you find the facts to be all the -- as all the evidence tends to show, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

However, if none of you find this circumstance to exist even though there is no evidence to the contrary, then you would so indicate by having your foreman write "no" in that space.

Issue -- mitigating circumstance two, the capital felony was committed while the defendant was under the influence of a mental or emotional disturbance. Consider whether this murder was

committed while the defendant was under the influence of a mental or emotional disturbance.

A defendant is under such influence if he is in any way affected or influenced by a mental or emotional disturbance at the time he kills.

All of the evidence tends to show that the capital felony was committed while the defendant was under the influence of a mental or emotional disturbance. Therefore, as to this circumstance, I charge you that if one or more of you find the facts to be as all the evidence tends to show, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

However, if none of you find this circumstance to exist even though there is no evidence to the contrary, then you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

You would find this mitigating circumstance if you find that the victim was killed by another person and that the defendant was only an accomplice or

an accessory to the killing and that the defendant's conduct constitutes relatively minor participation in the murder.

If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you finds this circumstance to exist, you would so indicate by having your foreman write "no" in that space.

Consider -- on number four, consider whether the defendant acted under the duress or domination of another person.

I instruct you that the defendant acts under duress even though it would not justify or excuse the killing if he acts under the pressure of any threats or compulsion from any source.

I instruct you that a defendant acts under the domination of another person if he acts at the command or under the control of the other person or in response to the assertion of any authority to which the defendant believes he is bound to submit or which defendant did not have sufficient will to resist.

If one or more of you finds by a

preponderance of the evidence that this circumstance exists, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you finds this circumstance to exist, you would so indicate by having your foreman write "no" in that space.

Consider whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

I instruct you that a person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know that what -- that what he is doing at a given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing or how wrong it is.

Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished.

Finally, this mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform his conduct to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of his impairment is lessened or diminished because of such impairment.

All of the evidence tends to show that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

Therefore, as to this circumstance, I charge you that if one or more of you find the facts to be as all the evidence tends to show, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

However, if none of you find this circumstance to exist even though there is no evidence to the contrary, then you would so indicate by having your foreman write "no" in that space.

Number six, consider the age of the defendant at the crime -- at the time of this crime -- excuse me. Consider whether the age of the defendant at the time of this crime is a mitigating factor.

The mitigating effect of the age of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence.

If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you finds this circumstance to exist, you would so indicate by having your foreman write "no" in that space.

You would also consider the fcllowing circumstances arising from the evidence which you find to have mitigating value.

If one or more of you find by a preponderance of the evidence that any of the following circumstances exist and also are deemed by you to have mitigating value, you would so indicate by having your foreman write "yes" in the space provided.

If none of you find the circumstance to exist or if none of you deem it to have mitigating value, you

would so indicate by having your foreman write "no" in that space.

Consider whether the defendant is mentally retarded as indicated by one or more of the following facts:

The defendant was unable to perform adequately to keep up with his class in the fourth grade.

The defendant was determined to be in the mentally retarded range of intellectual functioning in the fourth grade.

Defendant was transferred to a special school for the emotionally disabled and mentally retarded in the fifth grade.

When the defendant was fifteen years old, his reading recognition level was evaluated at fourth grade, four months.

When the defendant was fifteen years old, his reading comprehension level was evaluated at second grade, nine months.

When the defendant was fifteen years old, his spelling level was evaluated at third grade, nine months.

When the defendant was fifteen years old, his I.Q. was determined to be 56.

You would find this mitigating circumstance if you find that the defendant is mentally retarded and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in the space.

Consider whether the defendant has difficulty understanding the English language as spoken on an adult level and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant has difficulty understanding the English language as spoken on an adult level and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so

indicated by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant is easily influenced by others and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant is easily influenced by others and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in the space.

Consider whether the defendant has difficulty

figuring out how to solve problems and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant has difficulty figuring out how to solve problems and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in this space.

Consider whether the defendant has difficulty thinking clearly when under stress and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant has difficulty thinking clearly when under stress and that this circumstance has mitigating value.

If one or more of you find by a preponderance of the evidence that this circumstance exists and also

is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant is unable to visualize or anticipate social consequences and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant was unable to visualize or anticipate social consequences and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find the circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant is unable to make and carry out plans and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant is unable to make and carry out plans and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant grew up in an impoverished urban environment as evidenced by one or more of the following facts:

The defendant grew up in one of six high-rise apartment buildings in a housing project in Jersey City, New Jersey.

The building had constant maintenance problems, had graffiti on the walls and people did

drugs in the hallways and urinated in the elevator.

The defendant was raised by his grandmother and had limited contact with his natural father and mother.

The defendant's mother left New Jersey and moved to North Carolina with her two children when he was nine years old leaving him in New Jersey and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant grew up in an impoverished urban environment and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find the circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant was raped and sexually abused when he was twelve years old and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant was raped and sexually abused when he was twelve years old and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant, shortly after arrest and at an early stage of the criminal process, the defendant voluntarily cooperated with the police by making a confession and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that shortly after arrest and at an early stage of the criminal process, the defendant voluntarily cooperated with the police by making a confession and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating and -- you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether defendant has adapted to the discipline environment of prison and has committed no infractions during the period from 1983 to 1991 and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant has adapted to the discipline environment of prison and has committed no infractions during the period from 1983 until 1991 and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in this space.

Consider that while in prison, the defendant has participated in religious activities and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant while in prison has participated in religious activities and that the circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

No. 19, finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value.

If one or more of you so finds by a

preponderance of the evidence, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you finds any such circumstance to exist, you would so indicate by having your foreman write "no" in that space.

If one or more of you finds by a preponderance of the evidence one or more mitigating circumstances and have so indicated by writing "yes" in the space provided after this mitigating circumstance on the issue -- issues and recommendation form, you would answer issue two "yes."

If none of you find any of these mitigating circumstances to exist and have so indicated by writing "no" in the space after every one of them on the form, you would answer issue two "no."

If you answer issue two "yes," you must consider issue three.

If you answer issue two "no," do not answer issue three. Instead, skip issue three and answer issue four.

Issue three is, do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are,

insufficient to outweigh the aggravating circumstance or circumstances found?

If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in issue two.

In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance and then weigh the aggravating circumstances so valued against the mitigating circumstances so valued; and, finally, determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.

If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, you would answer issue three "yes."

If you do not so find or have a reasonable doubt as to whether they do, you would answer issue three "no."

If you answer issue three "no," it would be your duty to recommend that the defendant be sentenced to life imprisonment.

If you answer issue three "yes," you must consider issue four.

Issue four is, do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by one or more of you. When making this comparison, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence.

After considering the totality of the aggravating and mitigating circumstances, each of you

must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue "yes."

In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. You may very properly give more weight to one circumstance than another. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances.

After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty when considered with mitigating circumstances found by one or more of you, it would be your duty to answer the issue "yes."

If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue "no."

In the event you do not find the existence of any mitigating circumstances, you must still answer this issue. In such case, you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence or significance as to be sufficiently substantial to call for the imposition of the death penalty.

Substantial means having substance or weight, importance, significance or momentous.

Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances, it must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty; and before you may answer issue four "yes," you must answer unanimously that they are.

If you answer issue four "no," you must recommend that the defendant be sentenced to life imprisonment.

If you answer issue four "yes," it would be your duty to recommend that the defendant be sentenced to death.

Now, members of the jury, you have heard the evidence and the arguments of counsel for the State and for the defendant. The Court has not summarized all of the evidence, but it is your duty to remember all of the evidence, whether it has been called to your attention or not. And if your recollection of the evidence differs from that of the Court or of the district attorney or of the defense attorney, you are to rely solely upon your recollection of the evidence in your deliberations.

I have not reviewed the contentions of the State or of the defendant, but it is your duty not only to consider all the evidence, but also to consider all the arguments, the contentions and positions urged by the State's attorney and the defendant's attorney in their speeches to you, and any other contention that arises from the evidence, and to weigh them in the light of your common sense and to make your recommendation as to punishment.

The law, as indeed it should, requires the presiding judge to be impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice, or expression on my face, or a question I may have asked a witness, or anything else that I may have said or done during this trial that I

have an opinion, or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether any aggravating or mitigating circumstance has been proved or disproved, or as to what your recommendation ought to be. It is your exclusive province to find the true facts of the case and to make a recommendation reflecting the truth as you find it.

When you are ready to make a recommendation, have your foreman write in your recommendation as directed on the issues and recommendation form.

As to the three alternate jurors, I would ask at this time if you would step down and would you take a seat on the front row.

Ladies and gentlemen, as you retire, I am going to give the original of the issues and recommendation form in this envelope to the bailiff who will hand it to the -- to the -- whoever is selected foreman, and this is the form that you -- it's the original form that you will use in returning any recommendation that you may return in this case. I'll hand it to the foreman at this time -- I mean, to the bailiff at this time.

As you retire to the jury room, you should first select one of your members to serve as your

foreman to lead you in your deliberations. Do not begin your deliberations on the issues and recommendation until you receive the original issues and recommendation as to punishment form from the bailiff. Proceed immediately with the selection of your foreman; and then after receiving the original written form, proceed with your deliberations.

And when you are -- when you have reached a decision as to the issues and recommendation and are ready to pronounce them and your foreman has written the answers on the form, have your foreman sign and date it, notify the bailiff by knocking on the door to the jury room or summoning the bailiff and you will be returned to the courtroom to pronounce your answers to the issues and recommendation.

You may retire and select your foreman.

(The jury exited the courtroom.)

THE COURT: Before sending the original issues and recommendation form to the jury and allowing them to begin their deliberations, are there any requests for corrections to the charge as delivered by the State?

MR. CARTER: Judge, the State would just like to note one exception to the judge's instructions concerning the existence of certain facts that relate

to the mental or emotional disturbance of the defendant in that the Court said the evidence tended to show certain matters in mitigation.

THE COURT: Exception is duly noted.

Anything for the defendant?

MR. FULLER: One second, please.

(Defense counsel confer.)

MR. DAYAN: No, Your Honor. We just want to renew the objection we made yesterday with regard to the consideration of nonstatutory mitigating circumstances. We believe that the jury under the Eighth and Fourteenth Amendments does not have the authority to decide whether a factor has mitigating value.

THE COURT: Okay. Thank you.

Where's the bailiff?

MR. FULLER: Your Honor, I just don't want to drop something. I want to renew the motion we made regarding the Inman issue. In effect, renew the motions we made yesterday for the record.

THE COURT: All right. Motion denied.

Do they have a pencil and paper?

(Whereupon, the jury began its deliberations at 10:16 a.m.)

THE COURT: While the jury is deliberating, I

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

COUNTY OF CUMBERLAND — SUPERIOR COURT DIVISION

FILE NO. 91 CRS 40727

STATE OF NORTH CAROLINA)
)
VS)
)
HENRY LEE MCCOLLUM)
defendant)

V E R D I C T

We, the jury, return the unanimous verdict as follows:

1. GUILTY of FIRST DEGREE MURDER

Answer: YES

IF YOU ANSWER "YES," IS IT:

A. On the basis of malice, premeditation and deliberation?
ANSWER: _____

B. Under the first degree felony murder rule?
ANSWER: YES

OR

2. GUILTY of SECOND DEGREE MURDER

Answer: _____

OR

2. NOT GUILTY

ANSWER: _____

This the 18 day of Nov, 1991.

Carl Lee Stroud
FOREPERSON OF THE JURY

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF ROBESON — FILE NO. 83-CRS-15506-07

FILED

STATE OF NORTH CAROLINA)
)
VS.)
)
HENRY LEE McCOLLUM)

MOTION TO PERMIT VOIR DIRE EXAMINATION OF POTENTIAL JURORS REGARDING THEIR CONCEPTIONS OF PAROLE ELIGIBILITY ON A LIFE SENTENCE

NOW COMES the Defendant, HENRY LEE McCOLLUM, by and through his undersigned counsel and respectfully moves the Court, pursuant to the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19, 23, and 27 of the North Carolina Constitution, to permit counsel for the Defendant to ask prospective jurors in the jury selection process questions to elicit whether such prospective jurors harbor prejudicial misconceptions about the length of time the Defendant will be imprisoned before becoming eligible for parole if the Defendant receives a life sentence upon conviction for first degree murder. As grounds for this motion the undersigned shows the Court as follows:

1. The Defendant is charged in the above-captioned cases with, among other things, the offense of first degree murder for which the State has declared its intention to seek the death penalty. In addition, the Defendant is charged with the offense of first degree rape, for which the mandatory sentence is life in prison without possibility of parole for at least twenty (20) years. N.C. Gen. Stat. §14-27.2(b); N.C. Gen. Stat. §14-1.1(a)(2); N.C. Gen. Stat. §15A-1371(a).

2. Under North Carolina law as it presently exists, upon conviction for the offense of first degree murder if the Defendant is sentenced to life in prison he does not

become eligible for parole release for twenty (20) years. N.C. Gen. Stat. §15A-15A-1371(a1). Furthermore, if the Defendant is convicted of both charged offenses and receives a life sentence for murder and a consecutive life sentence for rape he would be required to serve forty (40) years in prison before becoming eligible for parole.

3. Jurors commonly believe that defendants who receive life sentences spend considerably less time in prison before being released than is possible under North Carolina law. *See* Paduano & Stafford Smith, *Deathly Errors: Juror Misconceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Col. Human Rts. L. Rev., Spring 1987 at 211; Dayan, Mahler, and Widenhouse, *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 Loy.L.A. L. Rev. 151, 166. A recent Georgia study, for example, revealed that the average juror believed that a murderer given a life sentence would be *released* in seven or eight years. *Id.* (citing Codner, "The Only Game in Town: Crapping Out in Capital Cases Because of Juror Misconceptions About Parole," 47-50 (Jan. 24, 1986) (unpublished paper, University of Michigan School of Law)). Exacerbating this general widespread misconception about parole eligibility, there has been a great deal of publicity and controversy over the past several years concerning the early parole release of prisoners in North Carolina, including those sentenced to life terms. *See, e.g., Parole of Murderer Defended*, Raleigh (N.C.) News and Observer, July 11, 1990, at 4B (regarding triple murder, suicide committed by man paroled in 1987 after receiving a sentence of 40 years to life in prison in 1974); *Legislature Lifts Prison Population Ceiling*, Raleigh (N.C.) News and Observer, March 7, 1990, at 1A; *Group Wants Convicted Murderers Denied Parole*, Raleigh (N.C.) News and Observer, March 3, 1990, at 7B; *Thornburg Seeks Parole Limits; Plan Would Prevent Release of Killers of Police Officers, Judges*, Raleigh (N.C.) News and Observer, Feb. 6, 1990 at 3B. *State's Prisons Push Limit Again: Prisons Face*

Emergency Action as Inmate Population Hits Limit, Raleigh (N.C.) News and Observer, Feb. 10, 1988 at 1A; *State of Emergency Declared in Prisons; Hundreds Become Eligible for Parole*, Raleigh (N.C.) Times, March 26, 1987; *700 More Inmates Will be Released*, Raleigh (N.C.) Times, March 11, 1987, at 1A.

4. North Carolina's prison overcrowding problem and "cap" on the prison population which has led to the early release of many inmates has received widespread publicity statewide and further fueled the public misperception that inmates convicted of first degree murder may receive early parole release if given a life sentence. *See, e.g., Prison Population Drops to 17,238; Emergency is Lifted*, Raleigh (N.C.) News and Observer, May 20, 1987 at 1C ("Parole Commission Chairman . . . said the inmates paroled during the emergency period were 'all across the board' in terms of types of crimes committed and length of sentences").

5. *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1989), presents a graphic illustration of the existence of juror misconceptions about parole. Immediately after a judgment of death was entered, one juror stated to a newspaper reporter: "If a person deserves a life sentence and gets it, he should serve life, instead of going and pulling five or ten years and getting parole." *Greensboro News and Record*, Feb. 3, 1988, at A6. Another juror remarked: "We felt with the possibility of him being out in a short time, that wasn't fair." *Id.* Given this information, the defendant filed a motion for appropriate relief asking that his sentence of death be set aside. The motion included affidavits from two jurors other than those who spoke with the newspaper reporter. One juror admitted that "[t]he question of parole was a primary factor in our deliberations." Motion for Appropriate Relief, *State v. Quesinberry*, No. 83-CrS-05 & 06 (Superior Court for Randolph County, filed February 12, 1988).

> [S]everal of the women jurors expressed concern that if [the defendant] received a life sentence he would be released on parole in ten (10) years, return to his drug use and commit another murder. . . . [T]en (10) years was the time period that we used during our deliberations about how much time [the defendant] *would actually spend in prison* if a life sentence was returned.

Id. (emphasis added). Another juror agreed, saying "[t]he possibility of parole was a pretty hot issue during the deliberations" and that the jury maintained that a life sentence would cause the defendant to "serve approximately ten (10) and no more than twelve (12) years in prison." *Id.*

6. Confronted with proof that jurors harbored misconceptions about parole which were considered in the decision to impose a death sentence, the State Supreme Court held that such misconceptions are "internal" influences on the jurors' decisionmaking process and may not be the basis of a post-conviction effort to impeach the jury's verdict. *State v. Quesinberry*, at 135-36, 381 S.E.2d at 688 (1989). In effect, the North Carolina Supreme Court's opinion in *Quesenberry* creates a risk in every case that jurors may base their sentencing decision upon "internal" errorneous notions about parole eligibility. The problem of permitting jurors to base a death sentence on erroneous information is compounded because the Court has thus far foreclosed every possible method for discovering or curing jurors' misconceptions about parole in advance of the verdict.

7. In *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279 (1987), the Court dealt with the question whether the constitution requires a jury to be truthfully informed in jury instructions about the parole consequences of a life sentence in order to dispel jurors' prejudicial misconceptions about parole. The Court found no due process or Eighth

Amendment violation in failing to provide information to the jury on parole eligibility. *Robbins*, at 520-21, 356 S.E.2d at 312.

8. The Court has further held that argument by defense counsel about the defendant's parole eligibility is "irrelevant to a determination of his sentence" and it is not error for a trial court to prohibit such an argument. *State v. Price*, 326 N.C. 56, 388 N.C. 84, 100 (1990)

9. Finally, the North Carolina Supreme Court has previously held that "because parole eligibility is irrelevant to the issues at trial and is not a proper matter for the jury to consider in recommending punishment" it is not error for a trial judge to refuse to allow *voir dire* examination as to jurors' knowledge about parole eligibility. *State v. McNeil*, 324 N.C. 33, 44, 375 S.E.2d 909, 916 (1989). That holding, however, is inconsistent with the constitutional commands for due process and reliability in capital sentencing proceedings. Both rudimentary constitutional principals are offended by law which, read together, permits the imposition of a death sentence based on jurors' erroneous ideas about how long the defendant will spend in prison if given a life sentence, yet prevents the defendant from doing anything to find out if the jurors at his trial in fact possess such misimpressions (and whether they may be influenced by them in their sentencing decision) and makes it impossible for defendants to present evidence or argument or obtain an instruction to correct the jurors' prejudicial misconceptions.

10. It is a fundamental precept of the Eighth Amendment that the "qualitative difference" between death and all other penalties necessitates a greater degree of "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (plurality opinion). Thus, a capital trial is subject to heightened procedural protections to insure that the sentencing result

is reliable. Placing limitations on voir dire that create a risk that a death sentence could be returned for reasons that would render the sentence unreliable is unconstitutional. *Turner v. Murray*, 476 U.S. 28, 35 (1986) (risk of racial prejudice infecting capital sentencing proceeding entitles defendant to question potential jurors about racial prejudice).

11. In addition to this Eighth Amendment requirement, it is now well established that the capital sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. In this context, the United States Supreme Court has condemned a procedure that permits the imposition of a death penalty on the basis of information that is kept secret from the defendant and thus provides the defendant with no opportunity to rebut or explain the information. *Gardner v. Florida*, 430 U.S. 349 (1977). Moreover, the Court noted that "[w]ithout full disclosure of the basis for the death sentence, the . . . capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*[, 408 U.S. 238 (1972)]. Additionally, it is well-settled that defendants possess a Sixth Amendment right to intelligently exercise peremptory challenges. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

12. To comport with these, and parallel state constitutional commands, capital defendants in North Carolina must be permitted to ask potential jurors questions during the jury selection process to find out if they harbor any prejudicial misconceptions about the length of time that a person convicted of first degree murder must spend in prison before becoming eligible for parole release. Surely, if a juror may base his or her sentencing decision on misconceptions about parole, *Quesinberry*, 325 N.C. 125, 135-36, 381 S.E.2d 681, 688 (1989), the defendant at a minimum must be able to find out from the jurors whether they have such misconceptions. Otherwise, jurors

will be entitled to premise their sentencing decision on erroneous information that is kept secret from the defendant and which the defendant is not given the opportunity to correct. Since *Quesinberry* squarely holds that it is not permissible to make the inquiry in post-trial proceedings, the only opportunity the defendant has to ferret out this highly prejudicial and potentially deadly information is in the jury selection process.

WHEREFORE, the Defendant respectfully prays the Court permit him to ask questions of potential jurors during jury selection about the jurors' views on the amount of time the defendant will be required to serve in prison upon being sentenced to life in prison for first degree murder.

Respectfully submitted, this the 21st day of September, 1990.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing upon counsel for the State by depositing a copy of same in a postage paid envelope in an official depository under the exclusive care and custody of the United States Postal Service addressed as follows:

Mr. John B. Carter
Assistant District Attorney
16B Judicial District
Robeson County Courthouse
Courthouse Square
Lumberton, NC 28359

This the 21st day of September, 1990.

Robert Steven Mahler
Robert Steven Mahler

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

ROBESON COUNTY — SUPERIOR COURT DIVISION

FILED
ROBESON

83 CRS 15506
83 CRS 15507

STATE OF NORTH CAROLINA)
)
vs.)
)
HENRY LEE MCCOLLUM)
)
)

ORDER

Upon defendant's motion to permit voire dire examination of potential jurors regarding their conceptions of parole eligibility on a life sentence, the Court makes the following finding of facts and conclusions of law.

The defendant, Henry Lee McCollum, is charged in the above-captioned cases with the capital offense of first degree murder and also first degree rape.

That upon being tried for the offenses of first degree murder and first degree rape, a jury may convict the defendant of the principle charges against him or lesser included charges which may be submitted to the jury by the Court for their consideration.

That the North Carolina Supreme Court has consistently held in many cases beginning with State v. Conner, 241 NC 468 (1955) 85 SE 2d 584 (1955) that matters concerning parole eligibility are irrelevant to the issues at trial and recommendations concerning punishment.

Further in State v. Robbins, 319 NC 465 (1987), the North Carolina Supreme Court reiterated the principle, "a criminal defendant's status under the parole laws is irrelevant to a sentencing determination and, as

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such cannot be considered by the jury during sentencing whether in a capital sentencing procedure or in an ordinary case. "...the trial judge has a duty upon inquiry by the jury to admonish the jurors to disregard the possibility of parole and to dismiss it from their minds. The trial judge is also forbidden from informing them of the laws and practices governing parole". State v. Robbins supra at 518, 519. The Court went on to say "We are unconvinced that due process requires an instruction on parole procedures out of concern that a jury may have misconceptions about parole eligibility. Defendant's contention that most lay jurors harbor prejudicial misconceptions about parole can be based only on sheer speculation. The matter of parole is a factor not presented at trial and is completely irrelevant to the issues at trial." Robbins at 520, 521.

It is therefore ORDERED that the defendant's motion titled "Motion to Permit Voire Dire Examination of Potential Jurors Regarding Their Conceptions of Parole Eligibility On a Life Sentence" be denied.

This the 31 day of ~~January~~ July, 1991.

The Honorable Judge Dexter Brooks
Superior Court Judge

ARTICLE 85.

Parole.

§ 15A-1370.1. Applicability of Article 85.

This Article is applicable to all sentenced prisoners, including Class A and Class B felons, and Class C felons who receive a sentence of life imprisonment, who are not subject to Article 85A of this Chapter. (1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, s. 41; 1981, c. 662, s. 3.)

Editor's Note. — This section was enacted by Session Laws 1979, c. 760, s. 4. Section 6 of that act, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47, 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 15A-1371. Parole eligibility, consideration, and refusal.

(a) Eligibility. — Unless his sentence includes a minimum sentence, a prisoner serving a term other than one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes. Under this section, when the maximum allowed by law for the offense is life imprisonment, one fifth of the maximum is calculated as 20 years.

(a1) A prisoner serving a term of life imprisonment with no minimum term is eligible for parole after serving 20 years. This subsection applies to offenses committed on and after July 1, 1981.

(b) Consideration for Parole. — The Parole Commission must consider the desirability of parole for each person sentenced for a maximum term of 18 months or longer.

(1) Within the period of 90 days prior to his eligibility for parole, if he is ineligible for parole until he has served more than a year; or

(2) Within the period of 90 days prior to the expiration of the first year of the sentence, if he is eligible for parole at any time. Whenever the Parole Commission will be considering for parole a prisoner who, if released, would have served less than half of the maximum term of his sentence, the Commission must notify the prisoner and the district attorney of the district where the prisoner was convicted at least 30 days in advance of considering the parole. If the district attorney makes a written request in such cases, the Commission must publicly conduct its consideration of parole. Following its consideration, the Commission must give the prisoner written notice of its decision. If parole is denied, the Commission must consider its decision while the prisoner is eligible for parole at least once a year until parole is granted and must give the prisoner written notice of its decision at least once a year.

(c) Statement of Reasons for Release before Minimum. — If parole is granted before the expiration of a minimum period of imprisonment imposed by the court under G.S. 15A-1351(b) or recommended by the court under G.S. 15A-1351(d), the Commission must state in writing the reasons why the imposed or recommended minimum was not followed.

(d) Criteria. — The Parole Commission may refuse to release on parole a prisoner it is considering for parole if it believes:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

(e) Refusal of Parole. — A prisoner who has been granted parole may elect to refuse parole and to serve the remainder of his term of imprisonment.

(f) Mandatory Parole at End of Felony Term. — No later than six months prior to completion of his maximum term, the Parole Commission must parole every person convicted of a felony and sentenced to a maximum term of not less than 18 months of imprisonment, unless:

(1) The person is to serve a period of probation following his imprisonment;

(2) The person has been reimprisoned following parole as provided in G.S. 15A-1373(e); or

(3) The Parole Commission finds facts demonstrating a strong likelihood that the health or safety of the person or public would be endangered by his release at that time.

(g) Notwithstanding the provisions of subsection (a), a prisoner serving a sentence of not less than 30 days nor as great as 18 months for a felony or a misdemeanor may be released on parole

when he completes service of one-third of his maximum sentence unless the Parole Commission finds in writing that:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10).

In order that the Parole Commission may have an adequate opportunity to make a determination whether parole under this section should be denied, no prisoner eligible for parole under this section shall be released from confinement prior to the fifth full working day after he shall have been placed in the custody of the Secretary of Correction or the custodian of a local confinement facility.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, certain prisoners specified herein shall be eligible for community service parole, in the discretion of the Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of a probation/parole officer. A parolee who is paroled under this subsection must perform as a condition of parole 32 hours of community service for every month of his remaining active sentence, until at least his minimum sentence (if he was sentenced prior to July 1, 1981), or one-half of his sentence imposed under G.S. 15A-1340.4 has been completed by such community service, at which time parole may be terminated.

The probation/parole officer and the community service coordinator shall develop a program of community service for the parolee. The parolee must as a condition of parole complete at least 32 hours of community service per 30-day period. The community service coordinator shall report any willful failure to perform community service work to the probation/parole officer. Parole may be revoked for any parolee who willfully fails to perform community service work as directed by a community service coordinator. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

(1) Who is serving his first active sentence the term of which exceeds one year; and

(2) Who, in the opinion of the Parole Commission, is unlikely to engage in further criminal conduct; and

(3) Who agrees to complete service of his sentence as herein specified; and

(4) Who has served one-half of his minimum sentence (if he was sentenced prior to July 1, 1981), or one-fourth of a sentence imposed under G.S. 15A-1340.4.

For purposes of subdivision (1), a person is considered to be serving his first active sentence the term of which exceeds one year if he

a. Was convicted or sentenced in the same session of court of multiple offenses arising from the same transaction or series of transactions or his probationary sentence was revoked in the same such session of court,

b. Is serving an active sentence of at least one year for one of the multiple offenses described in sub-subdivision a., and

c. Had not received an active sentence of a[t] least one year prior to being sentenced for the multiple offenses described in sub-subdivision a.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) A fee of one hundred dollars ($100.00) shall be paid by all persons who participate in the Community Service Parole Program. That fee must be paid to the clerk of court in the county in which the parolee is released. The fee must be paid in full within two weeks unless the Parole Commission, upon a showing of hardship by the person, allows him additional time to pay the fee. The parolee may not be required to pay the fee before he begins the community service unless the Parole Commission specifically orders that he do so. Fees collected under this subsection shall be deposited in the General Fund. The fee imposed under this section may be paid as prescribed by the supervising parole officer. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 960, s. 2; c. 1012, ss. 2, 5; 1987, c. 47; c. 783, s. 7.)

§ 15A-1212. Grounds for challenge for cause.

A challenge for cause to an individual juror may be made by any party on the ground that the juror:

(1) Does not have the qualifications required by G.S. 9-3.

(2) Is incapable by reason of mental or physical infirmity of rendering jury service.

(3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.

(4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.

(5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime.

(6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.

(7) Is presently charged with a felony.

(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.

(9) For any other cause is unable to render a fair and impartial verdict. (1977, c. 711, s. 1.)

outweighed the mitigating, would impose it, but, initially, he was not sure and he hesitated, I think, for a sufficient period of time to give the State cause to believe that he would not be firm in his convictions and belief about the death penalty. And he never specifically stated that he was in favor of it.

THE COURT: First of all, the Court rules that the defendant has made a prima facie showing of the inference of purposeful discrimination in the selection of the juror -- jurors.

At this point I'll call on the State to respond. This is somewhat repetitious, but I want it of record as to the reasons for the excusing of James Petty, Jr., the first juror.

MR. CARTER: Judge, before I do that, I would ask for a mistrial in this case. I don't think that there is a basis for determining that the case has -- that the State has -- that there is a prima facie case of racial discrimination in the jury selection and I would ask for a mistrial based on that.

THE COURT: Motion for mistrial is denied at this point. State has not shown grounds for mistrial.

As to the way this hearing works, as I understand it, Mr. Carter, if the defense shows a -- any type of threshold showing relative to

discrimination, which in this case the Court observes that the first three jurors were black, first three jurors were excused, I think in and of itself that is a threshold showing.

The second aspect of this is I call upon the State to give me reasons before I rule and then give the defense opportunity to rebut what you have to say concerning the three --

MR. CARTER: Well, Judge --

THE COURT: -- before I make a final ruling. I have not made a final ruling at this point.

MR. CARTER: Judge --

THE COURT: However, I will.

MR. CARTER: We've had four jurors. One that has been accepted by both the State and the defendant is a minority. Appears to have an Hispanic background. I'd like to note that for the record. That would be juror number three.

Again, going to juror number one, Mr. Petty, Mr. Petty stated during voir dire that he knew, had friends in the Red Springs area. The juror at some point put his foot up on the jury box rail and asked the question, "What does a person have to do to get some water around here?" I would say, showing disrespect for the Court and for these proceedings.

That juror also has had psychological counseling lasting over a year. He appeared to be unstable in many respects and also appeared to be about the same age as this defendant.

He seemed to have a lackadaisical attitude concerning the seriousness of this matter and, again, referring to the Court -- to the juror's conduct during the questioning by the State. And he just did not appear to be a responsible juror who would take into account the seriousness of the charges against the defendant and the serious consequences of these charges.

THE COURT: As to juror Delois Stewart.

MR. CARTER: Your Honor, that juror at one point stated that she did not believe in the death penalty. She was wishy-washy about her answers concerning the death penalty. She was hesitant in many respects. It was the State's belief and contention that she appeared to be antagonistic towards the State's case by her answers. That can't be adequately reflected in the record because the record doesn't have -- is unable to reflect the tone of her voice in response to the questions proposed to her by the State.

But she did not seem to be firm in her

beliefs concerning her ability to abide by the law concerning the death penalty; and, again, at one point stated she did not believe in the death penalty.

THE COURT: And as to Michael Reese.

MR. CARTER: Your Honor, this person, again, at some point said that he might require the State to present evidence more than evidence beyond a reasonable doubt. He then later recanted that and said he would follow the judge's instructions; but initially his response was that because of the possible death sentence involved, that he would require burden of proof greater than a reasonable doubt -- beyond a reasonable doubt.

He's the same age as this defendant. He stated that he would believe a psychologist more so than other witnesses based on that person's training and education. He said that he would have sympathy for this defendant if it came out that he had a low I.Q., and he was not solid on his belief concerning the death penalty.

THE COURT: Defense want to offer any rebuttal to the statements made by the State?

MR. DAYAN: Your Honor, the very first rationale given by Mr. Carter for the excusal of Mr. Petty was that he knew people in Red Springs. Mr.

Santiago said that he had a route, delivery route to Red Springs and that he knew store managers in Red Springs because of that delivery route. So that the very first rationale articulated by the State is a pretext, or we would submit that it's a pretext because when Mr. Santiago said he knew people in Red Springs, he was not excused peremptorily and yet that's the very first rationale articulated by the State.

As to Ms. Stewart, the State says that she expressed an opposition to the death penalty. I don't have a particular recollection that she ever said she did not believe in the death penalty. I believe she said it would be difficult for her and that as a general matter she was not strongly in favor of the death penalty, but she said she could follow the law.

As to any inference about her answers which the State drew from the tone of her voice, I would leave that to Your Honor; but I would suggest that at this table, I certainly heard no such inference about her answers on her ability to follow the law.

As to this last juror, Mr. Reese, there was not even the slightest indication that he could not follow the law. He was clearly confused, as Your Honor noted earlier, about the burden of proof. But when presented with what the burden of proof would be as

instructed by the Court, he was unequivocal that he could follow the law as provided him by the Court.

And we believe that there has been a sufficient showing, as Your Honor noted, a prima facie showing of racial discrimination. The State has responded by trying to show nondiscriminatory reasons for the excusals, and the defense suggests that they at least in one -- in one respect are directly pretextual.

THE COURT: At this point I will state that I intend to rule -- to allow the motion. Now, I'm going to inquire of counsel on how they -- if there is a stipulation as how we will now proceed.

I will set aside the juror selected. We have initially picked a panel of forty people, approximately forty people, which I have divided into separate panels of twelve and who have not heard any of these proceedings as to questions. I can proceed with the next panel of twelve if that is stipulated to or I can set the whole panel of forty aside that we presently have selected and select a new panel of forty and begin again, if the jurors are available.

First of all, what says the defendant as to the method that they would agree on proceeding at this point?

MR. FULLER: Let me kind of respond in the alternative, please, Your Honor. Our first suggestion would be, based upon the finding, that Mr. Reese be seated, Mr. Santiago be left and that we proceed with the first panel.

The problem -- and I'm not just sitting around noting nothing but race, but the second panel -- I mean, as the odds had it, the first panel was a fair distribution. The second panel, as I recall, is eleven to one white and so that would kind of be almost a double whammy on the defendant to win, so to speak, with the first panel and then get a group that is not representative of the people he'd like to see representing a cross section of the community.

I would prefer to seat the jurors -- to seat Reese and Santiago and proceed, and I think the Court clearly has the equitable authority to do that. And if that -- if that happened, we would be satisfied and would so state on the record.

The alternative, I think, would have to be to kind of start over, and I hate to -- I mean, that means we've lost the time.

THE COURT: What says the State?

MR. CARTER: Judge, again, I would renew -- renew my motion for a mistrial.

Would like to state for the record also that I am a black prosecutor, or an African-American prosecutor.

I would contend, again, that defendant has not established a prima facie case of purposeful discrimination. I would like to give notice of appeal as to the Court's finding on that.

MR. FULLER: Your Honor, I am advised by Mr. Dayan that in a case in Duplin County, the trial judge did what we're asking here, which is to use its equitable power to seat one of the challenged jurors and then let the trial move forward.

I would have to say that with respect to the State's displeasure with the ruling, I guess I'd just put in one sentence: Motion for mistrial is not an alternative for appeal and our supreme court's repeatedly held that, so...

THE COURT: The -- where is Ms. Priest?

MR. FULLER: Your Honor, could I make one other comment?

THE COURT: Yes.

MR. FULLER: I'm not trying to pick a fight here, but I do want to make it clear and I think all the decisions of the supreme court, U.S. Supreme Court, are clear, that the right to the cross section of the

community belongs to the defendant. I'm obviously Caucasian, but it's not my right. Mr. Carter, no problem with his statement that he's African-American, as is co-counsel Bill Moore (sic). It's not counsel's right; it's the defendant's right. And that's one reason that we think it's important that when it's exercised, it not be in a way that's disadvantageous to the defendant.

We've got a Sixth Amendment right to a fair cross section of the community that is also in juxtaposition with both the state constitution and the federal constitution on the right to be free from discrimination.

That's why we think that the most appropriate remedy is to do what I understand has been done in the North Carolina courts before, and that is to cure the problem by seating the juror and then move forward in hope and expectation that the practice will not continue.

THE COURT: Okay. Would you go to the jury pool room and have juror Michael Reese brought to a holding area.

MR. CARTER: Your Honor, the State contends that we're being deprived of our right to exercise peremptory challenges, and, again, we would give notice

of appeal as to the finding of the Court that there has been a racial bias.

THE COURT: Mr. Carter, you can give notice of appeal, but this is not the appropriate time to give it.

(Pause.)

THE COURT: While I'm waiting on the answer concerning what the status of our jury panel is, I'm going to enter the following order:

That the Court rules that the defendant made a prima facie showing of the inference of a purposeful discrimination.

That the Court, upon hearing from the State relative to reasons for exercising peremptory challenges rebutted by the defense, enters the following findings of fact:

That the State's explanation as to the reason for the excusing of James Petty, Jr., relative to his appearing or evidencing an attitude that would be contrary to the State's position and the fact that the juror was the same or approximately the same age of the defendant, and that he appeared unstable is -- the Court finds to be a reasonably specific explanation of the legitimate reasons for exercising his challenge.

As to juror Delois Stewart, the State's

explanation of her being hesitant in answering as to the death penalty question or antagonistic, the Court does not find to be a reasonably clear and specific explanation for the legitimate reason of exercising the challenge.

As to the excusing of Michael Reese and the State's reasons for his answering questions relative to sympathy, or beyond a shadow of a doubt, and other similar questions, the Court specifically finds as to Michael Reese that the State has not given a clear and reasonable and specific explanation, and it appears to the Court that the juror, Michael Reese, was having extreme difficulty understanding the questions of the State.

And that based upon the questions asked, the Court finds -- excuse me. Based upon the observations of the Court, the arguments of counsel, the Court finds as a fact and concludes as a matter of law that there was the presence of a discriminatory use of peremptory challenges and enters the following order:

That the Court orders that the jury selection process will begin again with the use of randomly selected forty jurors from the jury pool and the same preselection instruction as given to this last panel. And I therefore instruct that a new panel of forty

names be drawn from -- to exclude any of the forty that we have presently drawn; and as soon as that's accomplished, we will begin the selection process again.

(Pause.)

THE COURT: We've got a panel that's going to be calling in at -- after eleven o'clock. If they need them to come in for other jury service, fine; otherwise, instruct them that they're excused for the week.

MR. FULLER: Your Honor, does the court administrator need additional copies of the questionnaire or are those available?

THE COURT: I think they probably have copies.

MR. FULLER: Okay.

THE COURT: Do we have copies of the questionnaire?

THE CLERK: Yes.

MR. CARTER: Judge, under the circumstances, the State would request a recess until tomorrow morning.

THE COURT: What's the reason, Mr. Carter?

MR. CARTER: Judge, based on the finding by the Court, the State has asked to recess. I feel that

that this is not a case only concerned with first degree murder. We're also concerned with the crime of first degree rape. So you have two decisions to make, first of all: Whether or not this defendant is guilty of any type of murder charge and whether or not he's guilty of a rape charge.

Now, we ask you, as I continue to argue to you, we ask you, the victim's family, the officer -- my office, we ask you to remember the oath that you took as jurors to base your verdict solely on the evidence that you heard from the witness stand. And I submit to you, if you live up to that oath, the oath that you all took, that you all swore on the Bible to, or affirmed to, then you will be convinced beyond a reasonable doubt that this defendant is guilty of first degree murder based on malice, premeditation and deliberation, guilty of first degree murder based on the felony murder rule as it relates to rape, and also guilty of first degree rape.

Now, in this country, we're known as a benevolent country. And when I say that, we're known as a country who likes to help other countries out. You know, this is a giving nation, and this nation probably gives more aid to any other -- gives more aid than any other country in this world. And there's a

of the killing, including the fact that the death was by strangulation." You know, strangulation doesn't just happen. You have to do something to strangle a person. And this child was definitely strangled or suffocated on those panties.

So, again, do we have premeditation and deliberation? Do we have malice? We absolutely do. And you told me that as jurors, if we proved that to you beyond a reasonable doubt, you said you would live up to your oath and you'd find the defendant guilty of first degree murder based on malice, premeditation and deliberation. We're asking you now to keep your promise. That's what we're asking you to do. If he's guilty of murder based on malice, premeditation, deliberation, when you go back there to that jury room, your foreperson, male or female, you sign that, you mark it, or whatever you have to do, murder based on premeditation, deliberation. You mark that box, you sign it as foreperson, you date it and you come back out here.

Consider again, was this a murder based on the felony murder rule? The felony murder rule is very simple. It's a killing done during the commission or perpetration of another felony. The perpetrated felony in this case was rape, and that's -- that's just so

basic I'm not going to try to go into a lot of evidence or argument about it because it's clear that this rape occurred, this killing occurred at the same time and this falls right smack into the middle of that theory of law of murder based on rape, the felony murder rule.

So that's going to be on that verdict sheet, also. Is the defendant guilty based on the felony murder of rape? Was the killing done pursuant to a rape? Again, when you go back there, you mark he's guilty based on the felony murder, too, you sign it, you date it and you come back out here and you speak a verdict that speaks the truth.

. That's all you have to do. And that's not asking too much of any of you. If you had to go through what Ronnie Buie has gone through, Sabrina Buie, asking you to do the right thing in this case of finding this defendant guilty only of what he's guilty of. I'm not asking you to do anything but the right and just thing under the law and the evidence and that's finding him guilty with malice, premeditation and deliberation, and also under felony murder, also first degree rape.

Now, I know many of you are probably saying why don't you sit down. Let these other lawyers talk.

We're tired of listening to you. Well, I'd like to sit down, but I have to know that I've done all I can as my part as a prosecutor in this case; and if I do less than that, then I've done a disservice to this victim's family and I've done a disservice to the citizens of Robeson County. So if I intrude on your time too much please try to understand. Please try to understand because, again, we're talking about a little eleven year old girl. We aren't talking about a piece of trash. We aren't talking about some animal. We're talking about a person that was a living human being who had a future at one time. That person is dead and she's dead solely because of actions of this defendant, his friends and his brother.

I don't know what else I can say to you. I hope I've said enough to convince you, but it's really not up to me. It's up to the evidence, as you said it would be, and it's up to the law as the judge is going to give it to you. And I submit if that's not enough, then there's just no way for this case to turn out in a manner that we think is just and fair.

But, again, listen to the defendant's argument, the defense attorney's argument. Listen to the instructions of the judge, and you consider whether or not this case is worthy of second degree murder or

not guilty. It's not. Come back with guilty verdicts on both of those theories of first degree murder and I submit to you you would have done what is fair and just. Come back with a verdict of first degree -- of guilty to first degree rape and you would have done what was right, just and fair in this case. Thank you.

THE COURT: Ladies and gentlemen, I'm going to ask you to go to the jury room for just a few minutes, and also instruct you as I have instructed you previously, not to form any opinions one way or the other about this case at this time until you've heard all of the arguments and the charge that I will give you. It will be approximately five minutes before we'll bring you back in.

(The jury exited the courtroom.)

THE COURT: I'd like to now inquire of the defendant whether or not you intend to present any argument to the effect of requesting the jury to return a verdict of guilty of second degree murder?

MR. FULLER: Your Honor, state for the record I have discussed this issue with Mr. McCollum before trial began, during trial and again today. It is my intention to invite or not to oppose the second degree murder. It is not my intention -- I can't say exactly

in the commission of that crime.

I instruct you, members of the jury, that you may find the defendant, Henry Lee McCollum, guilty of first degree murder on either or both of two theories; that is, on the basis of malice, premeditation and deliberation or under the first degree felony murder rule.

First degree murder on the basis of malice, premeditation and deliberation is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation.

First degree murder under the felony murder rule is the killing of a human being in the perpetration of rape.

Now, I charge that for you to find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, the State must prove five things beyond a reasonable doubt.

First, that the defendant intentionally and with malice, acting either by himself or acting together with another, specifically, Darrell Suber, Leon Brown and Chris Brown, did kill the victim, Sabrina Buie.

Malice means not only hatred, illwill or spite, as it is ordinarily understood, to be sure, that

was a proximate cause of the victim's death.

A proximate cause is a real cause; a cause without which the victim would not -- the victim's death would not have occurred.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally killed the victim, or that he intended that she be killed by another with whom the defendant acted in concert, and that this proximately caused the victim's death, and that the defendant intended to kill the victim or intended that she be killed, and that he acted with malice after premeditation and deliberation, it would be your duty to return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

However, if you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

Whether or not you find the defendant guilty of first degree murder on the basis of malice premeditation and deliberation, you will also consider whether he is guilty of first degree murder under the

first degree felony murder rule.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant, acting by him -- either by himself or acting in concert with Darrell Suber, Leon Brown and Chris Brown, engaged in vaginal intercourse with the victim, that he did so by force or threat of force, that this was sufficient to overcome any resistance that the victim might make, that the victim did not consent and it was against her will, and that the defendant, acting either by himself or acting in concert with Darrell Suber, Leon Brown and Chris Brown, inflicted serious personal injury upon the victim and was aided and abetted by another person or persons, and that while committing first degree rape, that the defendant killed the victim, or one with whom the defendant was acting in concert killed her, and that the act was a proximate cause of the victim's death, it would be your duty to return a verdict of guilty of first degree murder under the first degree felony murder rule.

However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first degree murder under the first degree felony murder rule.

Now, the verdict form that you will be given sets out first degree murder both on the basis of malice, premeditation and deliberation and first degree murder under the felony murder rule. In the event you should find the defendant guilty of first degree murder, then the foreman should indicate whether you do so on the basis of malice, premeditation and deliberation or under the felony murder rule, or both.

If you do not find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, and if you do not find him guilty of first degree murder under the felony murder rule, you must determine if he is guilty of second degree murder.

Second degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. Second degree murder differs from first degree murder in that neither specific intent to kill, premeditation nor deliberation is necessary.

In order for you to find the defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the defendant, acting by himself or acting in concert with Darrell Suber, Leon Brown and Chris Brown, intentionally and with malice killed the victim thereby proximately causing her death.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant, acting alone or in concert with Darrell Suber, Leon Brown or Chris Brown, intentionally and with malice killed the victim thereby proximately causing the victim's death, it would be your duty to return a verdict of second degree murder.

However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Regardless of how you find, members of the jury, as to the charge of first degree murder or second degree murder, you will also consider the charge of first degree rape to which the defendant has entered a plea of not guilty and is presumed to be innocent. The burden of proof is on the State to prove guilt beyond a reasonable doubt.

Now, I charge that for you to find the defendant guilty of first degree rape, the State must prove four things beyond a reasonable doubt.

First, that the defendant, by himself or acting in concert with Darrell Suber, Leon Brown and Chris Brown, engaged in vaginal intercourse with the victim.

Vaginal intercourse is penetration, however